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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN ANTONIO VELAZQUEZ,

Defendant and Appellant.

C062127

(Super. Ct. No. LF010620A)

A jury convicted defendant Juan Antonio Velazquez of first degree murder. (Pen. Code, § 187, subd. (a).) The trial court sentenced him to a state prison term of 25 years to life. On appeal, defendant contends the trial court erred in rejecting his request for a jury instruction on involuntary intoxication and improperly admitted evidence on rebuttal. Finding both of his contentions without merit, we shall affirm the judgment.

FACTUAL BACKGROUND

In the early morning of March 21, 2008, Neal Singer was drinking beer at Jack's Back, a bar in Lodi. Between 1:30 and 2:00 a.m., Singer played a game of pool with defendant. After the game, Singer and defendant became embroiled in an

altercation over a \$40 pool bet. Defendant told Singer, "I won, let me get my money." Shortly before closing time the altercation moved outside in front of the bar. Defendant appeared to be drunk and agitated, and his eyes were heavy and bloodshot. Singer was acting "drunk and obnoxious."

At approximately 2:00 a.m., residents of a nearby apartment building were awakened by a disturbance in an adjacent parking lot. Singer was screaming, "Help me, I need help, help me." The residents watched as defendant threw rocks and a piece of concrete at Singer, who was lying face down on the ground. Defendant also kicked Singer in the head. As defendant stood over Singer, he said, "I'm going to kill you." When a resident told defendant to leave Singer alone and threatened to call the police, defendant responded, "I don't care, call the police." He then walked slowly, in staggered fashion, away from the scene.

Lodi police officers arrived at the scene and found Singer's body lying face-down in a pool of blood. His face had been crushed in. An autopsy revealed that Singer died of repeated blows to the head. He had sustained at least 56 distinct blunt force traumas. The injuries to the back of his head were likely caused by a 14-pound bloody piece of concrete recovered from the scene. Singer also suffered stomping injuries, including an injury bearing the imprint of a metal-toed shoe on his face.

An officer responding to the scene noticed defendant walking at a hurried pace. The officer contacted defendant and noticed blood on his mouth and alcohol on his breath. Defendant was arrested and transported to jail, where a preliminary alcohol screening (PAS) revealed a blood-alcohol level of 0.129 percent. Defendant's blood was drawn and tested positive for Valium, a benzodiazepine.¹

An examination of defendant's sweatshirt, shoes, and jeans revealed bloodstains matching Singer's DNA. The blood on defendant's face also matched that of Singer. Several areas on the bloody piece of concrete recovered from the scene tested positive for Singer's DNA. Additionally, acetaminophen pills found in defendant's pockets were similar to those found approximately 20 feet from Singer's body at the crime scene.

Defense

Defendant claimed he suffered from a mental disease or defect and/or voluntary intoxication that was inconsistent with harboring specific intent, malice, premeditation, or deliberation.

Dr. Albert Globus testified that defendant had incurred brain damage from separate head injuries that occurred in 1984 and 1999. Dr. Globus testified that defendant also suffered from severe short-term memory lapses and chronic alcoholism.

¹ Valium is a prescription medication used to treat seizure disorders and anxiety. It has a short-term impact on memory and motor functions.

According to Globus, defendant had been a heavy drinker since the age of 12² and had a history of alcohol-related blackouts. On one occasion, defendant drank so much that he lay down in the middle of the street, fell asleep, and had to be dragged off the street by his friends.

Defendant told Dr. Globus that he had been drinking beer and tequila shots on the day of the incident, but he did not remember how much alcohol he had consumed that day.³ He also told Globus that he had illegally purchased an unknown quantity of Valium, a benzodiazepine, on the street and was taking two pills every two hours for the entire day. Based on his examination, Globus opined that the combination of alcohol and benzodiazepines, along with two apparent head injuries incurred during defendant's lifetime, "combined [to] have a very serious impact on [his] memory" and social judgment.

Several of defendant's friends testified as to his character and reputation for peacefulness.

PROCEDURAL HISTORY

Defendant was charged with one count of first degree murder. (Pen. Code, § 187, subd. (a).) The jury found him

² At the time of trial in March 2009, defendant was 38 years old.

³ One of defendant's friends testified that defendant had been drinking continuously from the night of March 19, 2008, until around midnight the next day.

guilty of the charged offense. The trial court sentenced him to 25 years to life in state prison.

DISCUSSION

I. Instruction on Involuntary Intoxication

Prior to closing arguments, defense counsel advocated giving a jury instruction on involuntary intoxication (CALCRIM No. 3427),⁴ asserting that defendant took the Valium pills as a painkiller, without knowing of their potentially intoxicating effects. The trial court denied the request, stating that defendant could not claim that he did not know of the side effects of a drug when uncontradicted evidence showed that he had illegally purchased it off the street.

However, the court did give a series of defense-oriented instructions, which explained the concepts of mental impairment, voluntary intoxication, voluntary intoxication causing unconsciousness, and hallucination.

Defendant argues the trial court erred in denying his request for a jury instruction on involuntary intoxication. Although he admits that he voluntarily ingested alcohol and benzodiazepines, defendant claims that the instruction was warranted because there was evidence that the combination of the

⁴ CALCRIM No. 3427 provides in relevant part that: "A person is *involuntarily intoxicated* if he or she unknowingly ingested some intoxicating liquor, drug, or other substance, or if his or her intoxication is caused by the force, duress, fraud, or trickery of someone else, for whatever purpose[, without any fault on the part of the intoxicated person]."

two unexpectedly caused a pathological condition resulting in violent behavior. The claim is unavailing.

A court need only give a requested instruction "if the defendant proffers evidence sufficient to 'deserve consideration by the jury'" (*People v. Barrick* (1982) 33 Cal.3d 115, 132.) However, if the evidence is minimal and unsubstantial, the instruction need not be given. (*People v. Flannel* (1979) 25 Cal.3d 668, 684-685.) "In other words, '[t]he court should instruct the jury on every theory of the case, but only to the extent each is supported by substantial evidence.'" (*Id.* at p. 685 & fn. 12.)

"'[W]here the intoxication is induced through the fault of another *and without any fault on the part of the accused*, it is generally treated as involuntary.'" (*People v. Velez* (1985) 175 Cal.App.3d 785, 796 (*Velez*).) The dispositive question is whether the defendant knew or had reason to expect that his use of a particular substance could cause intoxicating effects. (*People v. Chaffey* (1994) 25 Cal.App.4th 852, 857 (*Chaffey*).) "[C]ourts have allowed the defense of involuntary intoxication based on the ingestion of an unlawful drug where the defendant reasonably believed he was consuming a lawful substance or where the unlawful drug was placed without defendant's knowledge *in a lawful substance*." (*Velez, supra*, 175 Cal.App.3d at p. 796, citing *People v. Scott* (1983) 146 Cal.App.3d 823, 826-827.) The defense has also been allowed in situations involving the knowing ingestion of legally prescribed medications which

resulted in unforeseen side effects causing unconsciousness. (See *People v. Baker* (1954) 42 Cal.2d 550, 575; *Chaffey, supra*, 25 Cal.App.4th at p. 856.)

However, the involuntary intoxication defense is not available to those who *voluntarily* consume alcohol or illegal drugs to the point of intoxication. These people are held responsible for their ensuing criminal acts, even if they were unconscious when they committed them. (*People v. Morrow* (1969) 268 Cal.App.2d 939, 949 [alcoholic who takes his first drink by choice and successively drinks himself into a drunken state is not "involuntarily" intoxicated]; *Velez, supra*, 175 Cal.App.3d at pp. 795-796 [involuntary intoxication defense not available to a defendant who voluntarily smoked marijuana cigarette furnished by others but was unaware it was laced with phencyclidine (PCP)].)

Here, the trial court properly rejected defendant's request for an involuntary intoxication instruction. Defendant did not unknowingly consume a lawful substance "spiked" with an unlawful drug, nor did he knowingly ingest a legally prescribed medication that had unanticipated side effects producing unconsciousness. Rather, he intentionally exposed himself to excessive amounts of alcohol, along with Valium pills that he purchased off the street.

Defendant knew that consuming alcohol could have dangerous effects on his behavior, since he expressed concern to Dr. Globus about his history of alcohol-related blackouts.

Defendant was also aware that he had episodes of blackouts and memory loss associated with excessive alcohol consumption. By consuming large quantities of alcohol along with an illegal street drug, defendant assumed the risk he would suffer serious and dangerous side effects.

As the court stated in *Velez*, "defendant cannot contend he was involuntarily intoxicated, because he had no right to expect the substance[s] he consumed [were] other than [they were] nor that [they] would produce an intoxicating effect different from the one [they] did." (*Velez, supra*, 175 Cal.App.3d at p. 796.)

For all of these reasons, we conclude the instruction on involuntary intoxication was properly refused.

II. Rebuttal Evidence

In defendant's case-in-chief, he presented several witnesses who testified on his character for peacefulness. On rebuttal, the prosecution recalled Detective Leo Ramirez, lead investigator on Singer's murder. Ramirez identified eight photographs depicting defendant at the time of his arrest. He testified that, as shown in the photographs, defendant had red stains on his clothing and right hand, and a scraping injury on his right palm. Defense counsel objected to the proffered evidence, contending it was improper rebuttal, but the prosecutor replied that the evidence was offered to rebut defense testimony attesting to defendant's character for peacefulness. The trial court overruled the objection.

Defendant contends the trial court abused its discretion in admitting the photographs along with Detective Ramirez's testimony. He claims the evidence constituted improper rebuttal because it did not fortify any part of the prosecution's case-in-chief which had been attacked by defense evidence. We need not reach the merits of this argument, because "any error must be seen as harmless in that there is no reasonable probability of a more favorable result" had the rebuttal evidence been excluded. (*People v. Jordan* (2003) 108 Cal.App.4th 349, 366.)

Defendant's assertion that the introduction of the photographs was prejudicial and "affected the integrity of the verdict" grossly overestimates its impact on the jury. The questioning of Detective Ramirez on the photographs was brief and unspectacular. The photographs simply displayed in visual form what several witnesses had already testified to regarding defendant's physical appearance at the time of his arrest. Moreover, there was no dispute as to defendant's identity as the person who brutally murdered Singer in the parking lot.

Since Detective Ramirez's testimony and the accompanying photographs did nothing more than reaffirm the highly incriminating evidence the jury had already received, we have no hesitation in concluding that it is not reasonably probable defendant would have achieved a better result had the court excluded the evidence. (*People v. Jordan, supra*, 108 Cal.App.4th at p. 366; Evid. Code, § 353, subd. (b).)

III. Penal Code Section 4019

Pursuant to this court's miscellaneous order No. 2010-002, we deem defendant to have raised the issue whether recent amendments to Penal Code section 4019, effective January 25, 2010, entitle him to additional presentence custody credits. They do not. (Pen. Code, §§ 1192.7, subd. (c)(1), 4019, subds. (b)(2) & (c)(2).)

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

ROBIE, Acting P. J.

CANTIL-SAKAUYE, J.